

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 408 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KIRITBHAI R. PATEL

Versus

LAVINA CONSTRUCTION & FINACE LTD

Appearance:

MR MUKESH A PATEL for Petitioner

DS AFFI. NOT FILED for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 21/01/98

ORAL JUDGEMENT

1. This company petition is filed by Shri Kiritbhai R. Patel, under sec. 433 of Companies Act. In this company petition, the petitioner is seeking order of winding up by making the following allegations:

"The petitioner submits that this petition is filed for the purpose of order of winding up of the Respondent Company under section 433 on the

ground of mismanagement of the Company and in alternative seeking direction against the respondents to handle the management of the Company and to provide details to the petitioner herein and for further declaration that the respondents have not properly managed the business of the company in the interest of the company."

2. Besides making above averments, the petitioner has not made any averments in the main petition for seeking order of winding up of the company. No doubt, the petitioner has filed affidavit in support of the said petition and, in the said affidavit, the petitioner has stated that the respondent no. 1 is having 10,000/ shares and the petitioner is holding 25,000/ i.e. 1/4 share capital which is invested by him as per his claim. Besides the petitioner, there are 14 share holders and respondents no. 2 to 4 are among them and, they are the directors of the respondent no.1-company and, they were looking after the management of the said company. In the said affidavit, the petitioner has clearly stated as under:

"I say and submit that so far as myself is concerned my availability in Surat city was not confirmed and many a times I am going out of the country and, therefore, the total holding of the management and the business are in the hands of the Respondents and accordingly the respondents no. 2,3 & 4 were looking after the management of the company and it was their boundan duty to manage the affairs of the company which may not prejudiciously affect the interest of the company."

3. Than in the next para, he has stated that recently he had studied the Audited Annual Accounts of the respondent no. 1 company and he found certain doubtful details and irregularities touching to the business of the company and the management of the Company, therefore, he was insisting the respondents no. 2 to 4 to give him details of the resolutions passed and details regarding the accounts, but respondents no. 2 and 3 refused to do so, but after continuous insistance they furnished the details, but according to him, they were incomplete. He has further stated that the details supplied were examined by one Mr. Sharma, who was deputed by him to inspect the accounts and said Mr Sharma has reported to him that no total details were supplied. It is his further claim that in the year 1993-94 six

flats were to be sold by respondent no. 1 company which were worth Rs 25,03,500/, and the possession of the said flats were handedover by the said respondent without recovering the total amount of the sale consideration. Similarly, amount of Rs 6,50,000/ is shown in Tijori accounts in the name of respondent no. 2, and, thus, according to him there were mismanagement by the respondents and the respondents have joined hands with these persons, who have purchased the said flats. The prayer made by him in the petition are as under:

- A) This Hon'ble Court be pleased to pass an order for winding up the Respondents company i.e. Lavina Consttuction & Finance Pvt. Ltd.
- B) This Hon'ble Court be pleased to restrain the Respondents from making them any major payments other than Sundry expenses and from taking any major decisions and the execution of the documentation with regarto the property of the company or the stock of the Company, including execution of Sale Deed of six flats shown in the statement.
- C) This Hon'ble Court be pleased to pass such other and further orders as may be necessary in the interest of justice."

4. It is very pertinent to note that the present petitioner had not called upon the respondents to supply him any information which he wanted by issuing letter and/or notice. He says that Mr Sharma has inspected the accounts and other documents as he was deputed by him and, than Mr Sharma has reported him, but no report of Mr. Sharma is produced by him nor he has filed any affidavit of Mr. Sharma in support of this petition. It seems that from the affidavit of the petitioner as well as main petition the petitioner wants to take over the management from the respondents no. 2 to 4. It is very pertinent to note that neither in the affidavit nor in the petition he has given any specific instances to show mismanagement. No doubt, he has alleged that the possession of the six flats was given to the six persons without receiving the total sale consideration. But, it is very pertinent to note that it is not his claim that the title of the said flats is transferred by the respondents in favour of those six persons. He has not also clearly mentioned as what is the price of each of

the flats and what amount is received from each of them. It is also pertinent to note that neither in petition nor in his affidavit he said that he had either orally or has issued any notice to respondents no. 2 to 4 to know whether they have taken any steps against those persons who have not fully paid the price of the flats. Merely because the company is to receive the total price of the flats, it is very difficult to hold that it is a case of total mismanagement. It is also very pertinent to note that it is not the claim of the petitioner that none of those six persons or any of the six persons have no capacity to pay the price of the flats, as a matter of fact, he ought to have enquired with the respondents no. 3 to 6 as to why the amount of consideration is outstanding from those persons and their reply would have made clear as to why it is outstanding. It may be quite possible that company would be in a position to transfer clear title in favour of those persons and, therefore, those persons might have withheld the payment, but any way, as per the claim of the petitioner at the most it would be a case of mismanagement, but if provision of sec. 433 of Companies Act are seen, then it would be quite clear that mismanagement of the affairs of the company is not a ground for passing an order of winding up.

5. If there is a mismanagement of the company, the share holders can have the recourse to the provisions of sec. 397 and 398 of the Act and other provisions and they cannot have recourse of filing a petition under sec. 433 of the Act. When the petitioner has got alternative remedy the proceedings for winding up is not tenable. The Single Judge of this Court in the case of *In re ATUL DRUG HOUSE LTD.*, 41 Company Cases 352, has held that at the time of admission of a petition for winding up under sec. 433(f) the petitioner must convince the court not only of a just and equitable ground for so doing but also that there is no alternative remedy open to the petitioner. This is because if such a petition is admitted and there is a public advertisement it would cause irreparable harm to a solvent company even if the company succeeds ultimately.

6. Mr. Mukesh Patel learned advocate has vehemently urged before me that though the mismanagement is not a ground as contemplated under sec. 433 of the Companies Act as a ground for seeking the order of winding up, the petitioner can seek winding up of the Company under sec. 433(f). But in order to obtain an order for winding up of the company, the contributory

seeking exercise of the discretionary powers of the Code under sec. 433(f) of the Companies Act has to establish the circumstances justifying the winding up of the company and has further to show that no alternative remedy is available to him. Relief under sec. 433(f) based on the just and equitable clause is in the nature of the last resort without other remedies being not efficacious enough to protect the general interest of the company. Therefore, the remedy to wound up of the company is the last resort, the contributory should resort to. It is settled law that the court can refuse to order of winding up a company, if it is of the opinion that other remedy is available to the petitioner and that the petitioner is unsuccessfully seeking remedy of winding up. The Apex Court in the case of Hind Overseas Private Ltd. v. Raghunath Prasad Jhujhunwala and another, reported in AIR 1976 SC 565, has laid down the following principles while considering the winding up petition:

"When more than one family or several friends and relations together form a company and there is no right as such agreed upon for active participation of members who are sought to be excluded from management, the principles of dissolution of partnership cannot be liberally invoked. Besides, it is only when share holding is more or less equal and there is a case of complete deadlock in the company on account of lack of probity in the management of the company and there is no hope or possibility of smooth and efficient continuance of the company as a commercial concern, there may arise a case for winding up on the just and equitable ground. In a given case the principles of dissolution of partnership may apply squarely if the apparent structure of the company is not the real structure and on piercing the veil it is found that in reality it is a partnership. (para 32)

In a petition under Section 433(f) allegations therein are of primary importance. A prima facie case has to be made out before the Court can take any action in the matter. Even admission of petition which will lead to advertisement of the winding up proceedings is likely to cause immense injury to the company if ultimately the petition has to be dismissed. The interest of the petitioner alone is not of predominant consideration. The interests of the shareholders of the company as a whole apart from those of other interests have to be kept in

mind at the time of consideration as to whether the petition should be admitted on the allegations mentioned in the petition. (para 34)

The sixth clause of Section 433, namely,

'just and equitable' is not to be read as being ejusdem generis with the preceding five clauses. While the five earlier clauses prescribe definite conditions to be fulfilled for the one or the other to be attracted in a given case, the just and equitable clause leaves the entire matter to the wide and wise judicial discretion of the court. The only limitations are the force and content of the words themselves, 'just and equitable'. In view of Sections 397, 398 and 443(2), relief under Section 433(f) of the just and equitable clause is in the nature of last resort when other remedies are not efficacious enough to protect the general interests of the company. (paras 33 to 37)

There must be materials to show when

'just and equitable' clause is invoked, that it is just and equitable not only to the persons applying for winding up but also to the company and to all its shareholders. The company court will have to keep in mind the position of the company as a whole and the interests of the shareholders and see that they do not suffer in a fight for power that ensues between two groups. (Para 42)."

7. From the averments made by the petitioner in the petition as well as the statements made by the petitioner in his affidavit in support of the petition it is very difficult to hold that the petitioner has made out any case for exercising the discretionary powers for passing the order under sec. 433(f). I had specifically asked the learned advocate as to whether the petitioner has ever issued a notice calling up respondents no. 2 to 4 to explain as to why the possession of the six flats were given without receiving the full consideration and why the price of the six flats are outstanding and whether any steps are taken to get the said amount. To this query of mine, it was stated that petitioner has never issued any letter or notice seeking the said explanation. The petitioner has not also requested to call a special meeting to consider this aspect. From the averments made by the petitioner himself, it is quite clear that on account of his business activities, petitioner has to go

out of India on and often and he is not in a position to know the day to day management of the company and, he also did not want to take personal interest in the management and merely on account of his suspicion, he has filed the present petition. If at all his grievance for mismanagement is itself true and correct one, than he approach the company board for redress of the said grievance, but the present winding up petition is not called for.

8. The learned advocate for the petitioner has cited before me the cases of Virendra Singh Bhandari & others v. Nandlal Bhandari & Sons Ltd., reported in 52 Company Cases, 36, Anisha K. Shah vs. Fostenex Private Ltd. & Others., reported in 82 Company cases 514, Shakuntala Rajpal & Others v. Mckenzie Philip (India) P. Ltd. & Others, reported in 64 Company Cases, 585. Now all these cases are the cases in which there were originally partnership firm between the members of the family and the said original partnership firm were converted into private limited company and the persons who were in the management of the company were not allowing to participate by the other members of the family and they were also not given their shares as well as dividends and in those cases also, there was no direct orders of winding up company, but some interim relief by way of paying certain amounts were granted in favour of the petitioners who were denied their shares in the company as well as dividends of the company. Therefore, all those cases are not applicable to the case before me. He has also cited before me the case of Rajahmundry Electric Supply Corporation ltd. vs. A. Nageshwara Rao & Others, reported in AIR 1956, SC 213. The said case is under the old Companies Act, 1913 and facts of the said case is also not applicable to the case before me. The present case before me is squarely covered by the decision of the Apex Court reported in AIR 1976, SC 565, Hind Overseas Private Ltd. (Supra) and in view of the averments and material on record, I refused to admit this petition and I reject the same with no order as to costs. Interim relief granted stands vacated. Notice discharged.
